REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAJIADO

ELC CASE NO 819 OF 2017

JULIANA MUTHONI KITOLOLO.....PLAINTIFF

VERSUS

HOUSING FINANCE COMPANY OF KENYA LIMITED.....DEFENDANT

RULING

What is before Court for determination is the Defendant's Notice of Motion dated 20th March, 2019 brought pursuant to Sections 1A and 3A of the Civil Procedure Act and Order 17 Rule 2(1) & (3) as well as Order 51 of the Civil Procedure Rules. In the application, the Defendant seeks to have the suit dismissed for want of prosecution. The application is premised on the summarized grounds that the suit was last in court on 25th January, 2018 when the Court delivered a ruling dismissing the Plaintiff's application for injunction. The Plaintiff has failed to take any steps to prosecute the case and this demonstrates a lack of interest in it. Summons to enter appearance have never been taken out.

The application is supported by the affidavit of MUTUA MOLO an Advocate in conduct of the matter on behalf of the Defendant where he reiterates the Defendant's claim above and avers that the continued pendency of this suit when no action is being taken to progress it towards trial is causing the Defendant unwarranted anxiety and expense hence prejudicial to it.

The Plaintiff opposed the application and filed a replying affidavit sworn by JULIANA MUTHONI KITOLOLO where she claims to have been in direct negotiations with the Defendant herein, which culminated in a letter dated the 25th February, 2019 wherein they agreed with the Defendant on settlement terms of the suit and parties executed the said letter. She confirms that what remains of the suit is the filing of a consent order capturing the terms of the negotiated agreement. She reiterates that the suit has been compromised by the agreement between the parties.

Both the Applicant and the Respondent filed their respective submissions.

Analysis and Determination

Upon consideration of the Notice of Motion application dated the 28th March, 2019 including the supporting as well as replying affidavits and parties' submissions, the only issue for determination is whether the suit should be dismissed for want of prosecution.

The Applicant contends that this suit should be dismissed for want of prosecution and that no summons to enter appearance have been taken out. The Applicant in its submissions relied on **Order 17 Rule 2 (1) and (3) of the Civil Procedure Rules** as well as the following cases: **Azhar Mohammed Sheikh & 8 Others V Velji Narshi Shah & Another (2017) eKLR; Leonard Njogu V Barclays Bank of Kenya & Another (2014) eKLR; Auni Bhaiji & 4 Others V Chief Magistrate Milimani Courts & 2 others (2017) eKLR** to buttress its arguments. The Respondent submitted that there was plausible reason for the delay in prosecuting the matter and the period is not inordinate. She relied on the case of **Mwangi S. Kimenyi V Attorney General & Another (2014) eKLR** to support her argument.

Order 17 Rule 2 (1) and (3) of the Civil Procedure Rules provides that:'

> **1. In any suit in which no application has been made or step taken by either party for one year, the court may give notice in writing to the parties to show cause why the suit should not be dismissed, and if cause is not shown to its satisfaction, may dismiss the suit. (3) Any party to the suit may apply for its dismissal as provided in sub-rule 1.'**

Both parties admit this matter was indeed last in court on 25th January, 2018 when the Court delivered its ruling to the Plaintiff's application for injunction. The Plaintiff has explained the reason for the delay and annexed a letter from the Defendant dated 25th February, 2019. From a perusal of the said letter, I note that it is signed by both the Plaintiff and the Defendant. Further, the letter indicates the terms of settling the issue in dispute herein and at clause (iii) it states thus**:' that a consent to be recorded in court marking the pending matter number ELC**

Suit 819 of 2017 as settled.'

In the case of Ivita -vs- Kyumbu(1984) KLR 441 the issue of determination of delay was discussed as follows: **"The test is whether the delay is prolonged and inexcusable and, if it is, can justice be done despite such delay."**

Further in the case of **Mwangi S. Kimenyi -vs- Attorney General and Another, Civil Suit Misc. No. 720 of 2009,** the Court held that**:- 'When the delay is prolonged and inexcusable, such that it would cause grave injustice to the one side or the other or to both, the court may in its discretion dismiss the action straight away. However, it should be understood that prolonged delay alone should not prevent the court from doing justice to all the parties- the plaintiff, the defendant and any other third or interested party in the suit; lest justice should be placed too far away from the parties. Invariably, what should matter to the court is to serve substantive justice through judicious exercise of discretion which is to be guided by the following issues; 1) whether the delay has been intentional and contumelious; 2) whether the delay or the conduct of the Plaintiff amounts to an abuse of the court; 3) whether the delay is inordinate and inexcusable; 4) whether the delay is one that gives rise to a substantial risk to fair trial in that it is not possible to have a fair trial of issues in action or causes or likely to cause serious prejudice to the Defendant; and 5) what prejudice will the dismissal cause to the Plaintiff. By this test, the court is not assisting the indolent, but rather it is serving the interest of justice, substantive justice on behalf of all the parties."**

In associating myself with the two decisions I have cited above and applying them to the current scenario, it has emerged that the parties were negotiating out of court culminating in the Defendant's letter dated 25th February, 2019. I find that the explanation given by the Plaintiff is plausible and the delay is not inordinate as claimed by the Defendant. Further, there will be no injustice suffered by the Defendant as it already set down the terms for settling the dispute herein which terms were accepted by the Plaintiff.

On the Defendant's allegation that no summons to enter appearance were taken out by the Plaintiff. Order 5 rule 1 and 6 of the Civil Procedure Rules provides as follows:'

> **(1) When a suit has been filed a summons shall issue to the defendant ordering him to within the time specified therein. (2) Every summons shall be signed by the judge or an officer appointed by the judge and shall be sealed with the seal of the court without delay, and in any event not more than thirty days from the date of filing suit. (3) Every summons shall be accompanied by a copy of the plaint. (4) The time for appearance shall be fixed with reference to the place of residence of the defendant so as to allow him sufficient time to appear: Provided that the time for appearance shall not be less than ten days. (5) Every summons shall be prepared by the plaintiff or his advocate and filed with the plaint to be signed (6) Every summons, except where the court is to effect service, shall be collected for service within thirty days of issue or notification, whichever is later, failing which the suit shall abate.'**

From the Court file, Summons to enter Appearance were taken out and signed by the Deputy Registrar on 21st July, 2017.. In the current scenario, I note the Defendant was served with the Notice of Motion Application, Plaint and Witness Statements all dated 20th July, 2017 as evident in the affidavit of service dated the 21st July, 2017. Insofar as the said Affidavit of Service does not indicate whether the Defendant was served with summons to enter appearance, I note the Defendant entered appearance on 24th July, 2017 and participated in the proceedings herein by filing its replying affidavit and submissions except for its Defence. I note the Plaint raises triable issues and the Defendant has not indicated what prejudice it stands to suffer should the suit be allowed to proceed to conclusion.

In the Court of Appeal in the case of **RAMJI MEGJI GUDKA LTD –Vs- ALFRED MORFAT OMUNDI MICHIRA ;& 2 OTHERS [2005]** eKLR held as follows:

> **"In our view, the power to strike out pleadings must be sparingly exercised. It can only be exercised in clearest of cases. The issue of summary procedure and striking out of pleadings was given very careful consideration by this Court in DT DOBIE & COMPANY (KENYA) LTD. V. MUCHINA [1982] KLR 1 in which Madan J.A. at p. 9 said:-**
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> **"The Court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the process of the court. At this stage, the court ought not to deal with any merits of the case for that is a function solely reserved for the judge at the trial as the court itself is not usually fully informed so as to deal with the merits "without discovery, without oral evidence tested by cross-examination in the ordinary way." (Sellers LJ (supra). As far as possible indeed, there should be no opinions expressed upon the application which may prejudice the fair trial of the action or make it uncomfortable or restrict the freedom of the trial judge in disposing of the case in the way he thinks right."**
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> **In dealing with the issue of triable issues, we must point out that even one triable issue would be sufficient. A Court would be entitled to strike out a defence when satisfied that the defence filed has no merit and is indeed a sham."**

In relying on the above cited Court of Appeal decision as well as the overriding objective of this Court as governed by Section 3 of the Environment and Land Court Act which directs courts to ***facilitate the just, expeditious, proportionate and accessible resolution of disputes,*** I find that it would be pertinent if the suit was set down for hearing on its merits to enable the court make a final determination of the dispute at hand.

It is against the foregoing that I will decline to allow the Defendant's application dated the 20th March, 2019 to dismiss this suit for want of prosecution. I direct the parties to record the agreed consent as per the terms in the Defendant's letter dated the 25th February, 2019 within 30 days from the date hereof failure of which the suit should be set down for hearing on its merits.

Costs will be in the cause.

Date signed and delivered in open court at Kajiado this 3rd day of February 2020

CHRISTINE OCHIENG

JUDGE